ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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May 13, 2003

The Honorable J. Dennis Hastert
Speaker
U.S. House of Representatives
H232 Capitol
Washington, DC 20515-6501

The Honorable Nancy Pelosi
Democratic Leader
U.S. House of Representatives
H204 Capitol
Washington, DC 20515-6537

Dear Mr. Speaker and Mrs. Pelosi:

As ranking members of committees charged with overseeing the Department of Defense (DOD), we are writing to raise serious objections to the Department's legislative "transformation" proposal, also known as the "Defense Transformation for the 21st Century Act of 2003." The Pentagon submitted this 200-page proposal to Congress on April 11. This proposal would impede Congress' oversight abilities in numerous ways. By vastly reducing accountability, the proposal is also likely to increase the level of waste, fraud, and abuse of taxpayer funds at the Department.

The Defense Department is the nation's largest federal agency, with an annual budget of nearly $400 billion and capital assets of over $1 trillion. While its military effectiveness is unmatched, so are its management problems. To date, no major part of the Department of Defense has passed the test of an independent audit. The Inspector General has reported that the Department cannot properly account for over $1 trillion in transactions. The Department routinely overpays contractors, and the General Accounting Office has reported that the Department is responsible for 9 of the 25 highest risk areas in the federal government, including decades-old financial problems, a proliferation of incompatible information systems, and flawed weapons acquisitions processes, to name a few.

Despite these daunting problems, the Department has received significant funding increases and funding supplementals over the past several years. Although Congress should increase oversight as we increase funding and as we identify management problems, the

Department's transformation proposal goes in exactly the opposite direction and seeks to exempt broad areas of the Defense Department's operations from congressional oversight. For example, the Department's proposal would eliminate the existing civil service system for nearly 700,000 federal civilian employees, without first setting forth a system to replace it. These provisions would give unprecedented discretion to the Secretary of Defense to undo, in whole or in part, provisions adopted over the past century to ensure that our federal government does not become a patronage system.

The Department's proposal would also ignore past congressional direction and provide wholesale exemptions from a host of critical environmental statutes. Other provisions would repeal statutory requirements for the Department to submit to Congress over 100 reports, including critical studies of cost and military readiness, as well as notices of waivers of existing statutes. The proposal would also "sunset" all remaining reports, except the Secretary's annual report to Congress.

In addition to eliminating the majority of information routinely submitted to Congress, the Department's proposal would reduce congressional oversight over one of DOD's most complex and controversial programs by collapsing $9.1 billion in annual missile defense allocations into a single budgetary line item. This is more than many other federal agencies receive for their total annual budgets.

The common thread linking all of these provisions is an effort by the Department to substantially reduce congressional oversight and public accountability. Indeed, these proposals are part of a broader pattern by the Bush Administration to exempt itself from congressional scrutiny in general. The Administration has ignored requests from members of Congress for information, resisted efforts by GAO to obtain records, and issued a directive curtailing public access to information under the Freedom of Information Act. The White House has even restricted access to historical presidential records. As the *Washington Post* reported last month, the Bush White House is setting new records for not responding to inquiries and keeping information secret, on matters big and small.[1]

Article 1, Section 9, Clause 7 of the Constitution (known as the Accountability Clause) states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We feel it would be a dereliction of Congress' constitutional responsibilities to adopt these provisions because they would significantly curtail Congress' ability to monitor the spending of taxpayer dollars at the Defense Department.

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[1] *An Answer? Out of the Question,* Washington Post (Apr. 22, 2003).

The rest of this letter explains our specific objections to the Department's proposal.

Exemptions from Civil Service Laws

The Department's proposal includes broad exemptions to the federal laws passed by Congress to eliminate the corrupt patronage systems of the past that rewarded political favors instead of dedication and hard work. The Department's proposal would allow the Secretary to waive 12 major chapters of title 5 of the U.S. Code. Rather than replace the existing system with an alternative proposal, the Department would exempt itself from congressional authority over these issues, and leave the formulation of an alternative to a later date.

For example, the Department's proposal would allow the Defense Secretary to waive the collective bargaining rights provisions of chapter 71 of title 5. As a result, the Secretary could simply bypass employee unions that might have a better understanding of problems occurring with personnel at military bases. The Department's proposal would also allow the Secretary to exempt the Department from the General Schedule and Federal Wage System, giving supervisors complete discretion to set salaries and allocate raises. The Department's proposal would also allow the Secretary to exempt the Department from compliance with the due process and appeal rights provisions of chapters 75 and 77, allowing supervisors to deny employees their current rights to appeal unfair treatment to the Equal Employment Opportunity Commission and the Merit System Protection Board.

The Department's proposal would also authorize the Secretary of Defense to bypass the Office of Personnel Management and create an entirely new personnel system for the Defense Department. The proposal would allow the Secretary of to issue regulations, subject to the direction of the President, if the Secretary determines that they are "essential to the national security."

Although all of these proposed waivers are couched in the language of "flexibility" and "agility," their effect is to remove from Congress the ability to determine and oversee the rules of civilian employment at the Department of Defense. This effect might be different if Defense Department officials were proposing a new system to replace current law, but they are not. The Department's proposal contains virtually no details about the new personnel system they want to establish, including new pay systems, new hiring plans, and new due process and appeal rights. For example, Department officials have said they intend to institute a performance-based salary system that uses pay banding, yet their legislative proposal does not contain either of these terms, much less define them.[2]

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[2] Although the Department's proposal claims a new personnel system would be based upon "the Department's Civilian Human Resources Strategic Plan and incorporate certain best practices," GAO concluded that the Department's Strategic Plan is inadequate:

The Department's proposal is clear only about the statutes it would waive. This lack of accountability is compounded by the broad powers the Secretary of Defense is seeking under this proposal. Unlike current law, the Secretary would have authority under the Department's proposal to take many of these actions "at his sole, exclusive, and unreviewable discretion." Furthermore, regardless of what Department officials may intend to do today, they would be free to change or eliminate their systems whenever they chose. Each new administration and each new Secretary of Defense would be free to rewrite at will the rules governing the careers of almost 700,000 civilian employees, with absolutely no consultation with Congress.

Although the Department has argued that similar waivers were granted to the new Department of Homeland Security, at this point it is impossible for Congress to judge the success of that experiment. In the absence of compelling urgency, it is premature at best to move another one-third of the federal workforce out of the existing personnel system before the results of the changes enacted at the Department of Homeland Security are clear. Moreover, the Defense Department's proposal goes far beyond the waivers granted to the Department of Homeland Security. In addition to the waivers mentioned above, the Department could waive six other chapters that are not waivable for the Homeland Security Department, including:

> The human capital strategic plans GAO reviewed for the most part lacked key elements found in fully developed plans. Most of the civilian human capital goals, objectives, and initiatives were not explicitly aligned with the overarching missions of the organizations. Consequently, DOD and the components cannot be sure that strategic goals are properly focused on mission achievement. Also, none of the plans contained results-oriented performance measures to assess the impact of their civilian human capital initiatives (i.e., programs, policies, and processes). Thus, DOD and the components cannot gauge the extent to which their human capital initiatives contribute to achieving their organizations' mission. Finally, the plans did not contain data on the skills and competencies needed to successfully accomplish future missions; therefore, DOD and the components risk not being able to put the right people, in the right place, and at the right time, which can result in diminished accomplishment of the overall defense mission.
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> Moreover, the civilian strategic plans did not address how the civilian workforce will be integrated with their military counterparts or sourcing initiatives.

U.S. General Accounting Office, *DOD Personnel: DOD Actions Needed to Strengthen Civilian Human Capital Strategic Planning and Integration with Military Personnel and Sourcing Decisions* (Mar. 28, 2003) (GAO-03-475).

Hiring and Examination (chapters 31 and 33): allowing the Department to waive current restrictions against hiring relatives, as well as rules requiring examinations for positions in the competitive service;

Reductions-in-Force (chapter 35): allowing the Department to waive current requirements that reductions in force be based on tenure of employment, length of service, and efficiency or performance ratings rather than discrimination on factors such as gender, race, or ethnicity;

Training (chapter 41): allowing the Department to waive current requirements on the establishment and use of government training programs;

Pay Administration (chapter 55): allowing the Department to waive current requirements relating to overtime and compensatory pay, Sunday and holiday pay, jury duty pay, severance pay, and back pay following unjustified personnel actions; and

Allowances (chapter 59): allowing the Department to waive requirements for uniform allowances, quarters and facilities, overseas differentials, and danger pay.

Finally, although Under Secretary of Defense David Chu has argued that the requested exemptions would make the Department into a more "agile" force, he has failed to explain how the current system has hindered the Department's efforts to wage war in Iraq or anywhere else.[3] Comptroller General David Walker testified that he had "serious concerns" about the proposal, and that the Pentagon needs to improve its management systems to show that adequate safeguards are in place to minimize the chance of abuse.[4] As Mr. Walker explained, "moving too quickly or prematurely at DOD or elsewhere can significantly raise the risk of doing it wrong."[5]

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[3] House Committee on Government Reform, *Hearing on Transforming the Defense Department: Exploring the Merits of the Proposed National Security Personnel System* (Apr. 29, 2003).

[4] *Id.*

[5] *Id.*

Exemptions From Environmental Laws

During the last Congress, and again in the current proposal, the Department has proposed sweeping exemptions from a host of the nation's environmental laws. Section 301 of the Department's proposal, also known as the Readiness and Range Preservation Initiative, would weaken or eliminate the Department's responsibilities under many of the nation's landmark environmental laws, including the Clean Air Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), the Marine Mammal Protection Act, and the Endangered Species Act.

The Department's rationale for these proposals is that military training facilities are being "encroached" upon by having to comply with federal and state statutes that protect public health and the environment. Currently, the environmental laws at issue include processes for the Department to obtain exemptions from compliance or otherwise secure needed flexibility in the interests of national security. These processes require the Administration to notify Congress when it seeks to waive these statutes, and to justify its actions in administrative processes open to the public and Congress. Rather than submit to this system, which provides Congress with important oversight tools, the Department is seeking outright exemptions, thus reducing and even eliminating accountability.

When the Department requested these exemptions last year, Congress largely rejected the request because the Department could not demonstrate that overall readiness had been hampered. GAO criticized the Department for not having an inventory of training facilities that could be shared across various services. Similarly, the Department had no comprehensive data on training range requirements for each service. According to GAO:

> The services did not have complete inventories of their training ranges and . . . they do not routinely share available inventory data with each other . . . . Since there is no complete directory of DOD-wide training areas, commanders sometimes learn about capabilities available on other military bases by chance. All this makes it extremely difficult for the services to leverage assets that may be available in nearby locations, increasing the risk of inefficiencies, lost time and opportunities, delays, added costs, and reduced training opportunities.[6]

Without a basic inventory of available facilities and information on training range requirements, it was impossible for Congress or the Department to know whether existing facilities were sufficient or were in fact being limited in some fashion. For these reasons,

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[6] U.S. General Accounting Office, *Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving* (Apr. 2, 2003) (GAO-03-621T).

Congress required the Department, as part of the National Defense Authorization Act for Fiscal Year 2003, to develop a comprehensive plan for using existing training facilities, to conduct an assessment of current and future training range requirements, and to evaluate the adequacy of current resources to meet those requirements.[7] The Act also required the Department to submit annual reports to Congress regarding these encroachment issues.[8]

In testimony last month on this issue, GAO reported that the Department has failed to comply with any of these congressional directives.[9] GAO reported that "DOD has not completed a comprehensive plan or provided Congress with the progress report."[10] Although this failure may have discouraged most agencies from seeking further exemptions from congressional oversight, the Department's current proposal would seek even greater discretion than previous iterations.[11]

Today, however, there still appears to be no substantive basis for the Department's request, other than its desire to operate without accountability to Congress, and without having to consider the potential health and environmental impact of its actions on states and localities. On February 26, 2003, EPA Administrator Christine Todd Whitman testified that she was "not aware of any particular area where environmental protection regulations are preventing the desired training."[12] In addition, Ms. Whitman stated, "we have been working very closely with

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[7] Section 366, P.L. 107-314 (Dec. 2, 2002).

[8] *Id.*

[9] U.S. General Accounting Office, *supra* note 6.

[10] *Id.*

[11] In addition to previous exemptions, section 315 of the Department's March proposal would allow federal agencies to avoid state court jurisdiction in cases involving the Clean Air Act or the Safe Drinking Water Act. Currently, these laws allow states to sue federal agencies in state court for violating state law. For example, in 1996, McClellan Air Force Base in Sacramento County released excess amounts of nitrogen oxides into the air in violation of its state permit. When the Sacramento Metropolitan Air Quality Management District sued, the Defense Department attempted to remove the case to a federal court, but a federal appeals court rejected this effort. *See Sacramento Metro. Air Quality Management Dist. v. United States*, 215 F.3d 1005 (9th Cir. 2000). In response, the Department is now proposing to allow federal agencies to avoid state court entirely.

[12] Testimony of Environmental Protection Agency Administrator Christine Todd Whitman before the Senate Environment and Public Works Committee (Feb. 26, 2003).

the Department of Defense and I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."[13]

For these reasons, the National Governors Association,[14] the Association of State and Territorial Solid Waste Management Officials,[15] and the Attorneys General of Arizona, California, Colorado, Massachusetts, Nevada, Idaho, New Mexico, Utah, New York, Oregon, and Washington[16] have raised concerns with the Department's proposal for outright exemptions from environmental laws, which would effectively curtail congressional oversight in this area.

Repeal of over 100 Reporting and Notification Requirements

Section 422 of the Department's proposal calls for the elimination of over 100 congressional reporting requirements. These reports inform Congress about many critical issues, ranging from cost (stationing U.S. forces abroad, annual operations and management budget, allocation of funds within operations and management accounts) to military readiness (personnel and unit readiness, aircraft inventory, unit operations and personnel tempo) to various departmental waivers of current law (prime contractors in cooperative agreements, contracts awarded to entities controlled by foreign governments).

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[13] *Id.*

[14] *See* National Governor's Association, *Superfund Policy* (Section 4.9: Federal Facilities) (2003) ("Federal facilities and former Federal facilities are among the worst contaminated sites in the Nation. This condition is a legacy of the lack of regulatory oversight at these sites for most of their history. The double standard of separate rules applying to private citizens and the Federal government continues to have a detrimental effect on public confidence in government at all levels. Federal facilities should be held to the same standard of compliance as other parties").

[15] *See* Letter from Mr. Mark Giesfeldt, President, Association of State and Territorial Solid Waste Management Officials, to Reps. Dan Burton and Henry A. Waxman (Mar. 15, 2002) (questioning "the need and wisdom for the proposed changes" and arguing that they "do not believe DOD has made a convincing case").

[16] *See* Testimony of Daniel S. Miller, First Assistant Attorney General of Colorado, before the Senate Committee on Environment and Public Works (July 9, 2002) ("The language of DOD's proposed amendments would create wide loopholes and jeopardize environmental protection, without any corresponding benefit to readiness").

In addition to the outright repeal of these reporting requirements, section 421 of the Department's proposal is a sunset provision that would eliminate all remaining Defense Department reports after five years. Because DOD's definition of "report" includes notices to Congress on the use of specific waiver authorities provided under existing law, the combination of these two provisions could give the Defense Department a virtually unfettered ability to use any waiver authority without reporting such action to Congress.

The Department is also proposing to eliminate analyses required under current law that are specifically designed to protect the taxpayers, including the requirement to perform cost-benefit analyses when privatizing DOD utility systems and analyses of whether converting public sector functions to the private sector actually saves money.

The only exception to these provisions is a single report: the Secretary's annual report to Congress. In other words, unless Congress were subsequently and affirmatively to require new reports, the Department of Defense — the nation's largest federal agency with an annual budget of nearly $400 billion — would submit only one annual report to Congress under this proposal. Notably, Defense Secretary Rumsfeld failed to submit even this report in two out of the last three years.

Elimination of Selected Acquisition Reports

Under the mantra of "acquisition reform," section 201 of the Pentagon's proposal calls for the repeal of the congressional requirement to submit "Selected Acquisition Reports." These reports provide quarterly cost, schedule, and performance information on major Pentagon weapons systems. They are often one of the only means for Congress and GAO — Congress' investigative arm — to obtain information about cost overruns, technical failures, and schedule delays in weapons development programs.

For example, the Government Reform Committee has held several hearings regarding mammoth levels of uncontrolled cost growth in the development of the F/A-22 Raptor aircraft. Using the Selected Acquisition Reports for this program, Congress and GAO have identified cost growth of nearly $20 billion in this program since 1997. Even with the current requirement to submit these reports, however, the Defense Department "has not fully informed Congress about specifics related to the total cost of the F/A-22 production program or the quantity of aircraft that can be purchased within the cost limitation," according to GAO.[17]

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[17] U.S. General Accounting Office, *Tactical Aircraft: DOD Needs to Better Inform Congress about Implications of Continuing F/A-22 Cost Growth* (Feb. 2003) (GAO-03-280).

The Department proposes to eliminate this legislative requirement, arguing that it "would prefer to provide Congress with more relevant information in response to specific requests." Unfortunately, the Department has a lengthy and consistent record of refusing to comply with specific congressional requests. For instance, the Department has rejected requests by both members and GAO for additional information about the costs and quantities of the F/A-22 aircraft.[18]

Missile Defense

The Department's proposal would reduce oversight of the Missile Defense Agency's budget and give it unprecedented spending authority enjoyed by no other federal agency. Specifically, section 413 of the Department's proposal would repeal the congressional requirement to separately identify missile defense spending for specific programs according to various line items, such as boost phase, midcourse, and terminal defenses. Sections 413 and 414 the proposal would allow the Department to lump its entire missile defense budget into a single line item defined only as "all necessary expenses for missile defense missions," and would allow the reprogramming of funds without congressional notification or approval.

The Administration's FY2004 funding request for the Missile Defense Agency is $9.1 billion. For purposes of comparison, the Administration's FY2004 request for all Army research and development programs is also $9.1 billion. The Army's research and development funding, however, is divided into 184 line items.

This is another area in which the Defense Department has refused to provide information in response to specific congressional requests. For example, as part of the missile defense Deployment Readiness Review in 2000, a report was compiled by the Defense Department's office of Operational Test and Evaluation, its chief independent test evaluator.[19] This unclassified report described in detail many critical flaws in the plan to test the national missile

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[18] *See, e.g.,* Letter from Rep. John F. Tierney to Under Secretary of Defense E.C. Aldridge, Jr. (Mar. 19, 2003) (requesting information on the number of F/A-22 aircraft the Department plans to procure within the congressional production cost cap); Letter from Under Secretary of Defense E.C. Aldridge, Jr. to Rep. John F. Tierney (Apr. 7, 2003) (refusing to provide such information); Letter from Subcommittee on National Security, Emerging Threats, and International Relations Chairman Christopher Shays, Ranking Minority Member Dennis J. Kucinich, and Rep. John F. Tierney to Defense Secretary Donald Rumsfeld (Apr. 23, 2003) (directing the Department to provide the information).

[19] Philip Coyle, *Operational Test and Evaluation Report in Support of National Missile Defense Deployment Readiness Review* (Aug. 10, 2000).

defense system for effectiveness. It found that the system's effectiveness is not yet proven, even in the most elementary sense, and that the system is too immature to assess its effectiveness or predict potential deployment dates. Yet the Defense Department tried repeatedly to keep this report from Congress. Despite numerous requests, the Pentagon refused to deliver the report for over eight months, disregarding a statute requiring its submission.[20]

Other Weapons Acquisitions Exemptions

In addition to the provisions described above, the Department's proposal includes numerous other exemptions. For example, section 201 of the Pentagon's proposal would repeal a provision that requires the Department to notify Congress of significant cost increases in major weapons programs (known as Nunn-McCurdy breaches). Section 422(a)(95) would also eliminate the requirement to report cost overruns on military construction projects. Taken together, these provisions would allow the Department to avoid reporting cost increases on almost every capital asset it purchases.

In addition to eliminating reporting requirements for weapons acquisitions, section 422(a)(50) would eliminate the requirement to notify Congress when the Department leases major equipment, such as vessels and aircraft. This exemption is being proposed even as the use of leases is increasing.

Section 201 of the Department's proposal would also eliminate the current law's requirement for the Department to establish a cost baseline for each major defense acquisition program before the program enters the full scale development and production stages where the bulk of the spending occurs. Without such a baseline, neither Congress nor the program managers in the Department of Defense will have a basis for measuring cost growth in these programs. It is inconceivable that the Department would not continue to collect such information for its own management purposes, and inexplicable that it would propose to keep that information from Congress.

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[20] *See* Letter from Rep. John F. Tierney to Subcommittee on National Security, Veterans Affairs, and International Relations Chairman Christopher Shays (Sept. 28, 2000); Letter from Subcommittee on National Security, Veterans Affairs, and International Relations Chairman Christopher Shays to Lieutenant General Ronald Kadish (Oct. 4, 2000); Letter from Rep. John Tierney to Subcommittee on National Security, Veterans Affairs, and International Relations Chairman Christopher Shays (Jan. 24, 2001). The Pentagon finally delivered the report, but only after 55 members of Congress, including the ranking minority members of three congressional committees, directed Defense Secretary Rumsfeld to provide it. *See* Letter from Rep. John F. Tierney et al. to Secretary of Defense Donald Rumsfeld (May 4, 2001) (directing Defense Secretary Rumsfeld to submit the report "forthwith, in its entirety, and without alteration").

These reductions in accountability and oversight also must be viewed in the context of other changes. For example, the Department is advocating a new "spiral development" approach to weapons development that envisions the incremental deployment of available technologies over time, rather than setting forth coherent requirements for the life of the development program. While this approach may succeed in fielding limited new technology sooner, it will also impair accountability by turning performance, cost, and schedule goals into moving targets that will make it difficult to measure the success or failure of these programs.

Conclusion

Since fiscal year 2000, defense spending has increased by one-third, from $300 billion to $400 billion a year. The Department is now proposing that this increase in resources be accompanied by unprecedented reductions in congressional oversight and public accountability, and in some cases unlimited increases in the powers of the Secretary of Defense. In these circumstances, we should be raising rather than lowering oversight.

Moreover, other parts of the package — such as the proposals to overhaul the rules governing nearly 700,000 federal civilian employees and exempt the Department from the nation's health and environmental laws — include sweeping but vague provisions with scant explanation of (1) what specific problems are being addressed; (2) how the provisions would address any such problems; or (3) why Congress should rush to overhaul an organization that has yet again demonstrated its ability to perform to the highest standards on the battlefield.

All of these provisions are linked by the Administration's desire to diminish the ability of Congress to fulfill its oversight responsibilities. We believe Congress should strongly resist these efforts and instead take time to carefully review each of these significant proposals. At a minimum, these provisions should not be included in the fiscal year 2004 defense authorization bill being marked up in various committees this week. It is not necessary to sacrifice congressional oversight and public accountability to achieve military effectiveness.

Sincerely,

Rep. Henry A. Waxman
Ranking Minority Member
Government Reform Committee

Rep. Ike Skelton
Ranking Minority Member
Committee on Armed Services

Rep. David R. Obey
Ranking Minority Member
Committee on Appropriations

Rep. John M. Spratt. Jr.
Ranking Minority Member
Committee on the Budget